

2. If so, what is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a post award proceeding for a review and modification of the Board's March 25, 2003 Order. At that time the Board found claimant was entitled to a permanent partial disability award for his June 21, 2000 back injury. The Board noted that after claimant's September 20, 2000 back surgery he was released by Dr. Lawrence A. Vierra with permanent restrictions of: 1) work day limited to four to six hours per day; (2) no repetitive lifting, bending, kneeling, stooping, or reaching; (3) no overhead work; (4) no lifting over 10 pounds; (5) avoid prolonged standing or walking over 30 minutes; (6) sitting, standing, walking as tolerated with ability to change positions; and (7) wear back brace as needed. However, due to a failure of proof, the Board found claimant had a zero percent task loss. Averaging this zero percent task loss with the 58 percent wage loss resulted in a work disability of 29 percent. The wage loss was arrived at by imputing a weekly wage earning ability of \$482, which was the amount claimant would have earned had he accepted the offer of accommodated employment with respondent working four (4) hours a day as a service advisor. Comparing claimant's pre-injury average weekly wage \$1,144.70 to the imputed \$482 weekly wage resulted in a 58 percent wage loss. The Board also found claimant's functional impairment to be seven percent.

Claimant filed his request for review and modification on May 1, 2003. Accordingly, pursuant to K.S.A. 44-528(d) any modification can take effect no earlier than November 1, 2002, which is six (6) months prior to the filing for review and modification.

Judge Fuller noted that:

The only new medical evidence presented as to the [c]laimant's current condition is that of Dr. Stein who gave the [c]laimant permanent restrictions. There was no limit on the number of hours per day the [c]laimant could work. He did find that the [c]laimant was unable to perform 13 of his 25 tasks, for a 52% task loss. . . .The [c]laimant has self determined that he is unable to work and has not looked for work since he last worked for the [r]espondent. It is clear that he has a task loss, but a wage loss is not so clear. The [c]laimant chose not to attempt the accommodated temporary position as service advisor, so he would have a weekly wage of \$482.00 imputed to him until released to return to full time employment. The only evidence presented as to his current work restrictions is the evaluation performed by Dr. Stein on 7/18/03 which did not restrict the [c]laimant's hours of work per day. Therefore, as of 7/18/03, the [c]laimant could have

returned to his full time position as service manager with his average weekly wage of \$1,144.70.¹

Dr. Stein had previously seen claimant on January 19, 1995. Thereafter, claimant received additional treatment including surgery and the placement of a dorsal column stimulator. At his subsequent July 18, 2003 examination, Dr. Stein rated claimant's permanent impairment as 18 percent to the body as a whole based upon the AMA Guides.² As to claimant's current permanent work limitations, Dr. Stein said claimant "should avoid lifting more than twenty pounds occasionally, five pounds more often, that he should avoid repetitive bending or twisting of the lower back, and that he should be able to alternate sitting and standing at reasonable intervals."³ He defined "occasionally" as one-third of an eight-hour day and "frequently" as up to two-thirds of an eight-hour day.⁴ As for "repetitive" Dr. Stein said "there is some flexibility in that but if you have to put a number to it, I would probably say that he should not be bending more than eight times in an hour and he should not be doing that more than four hours in an eight-hour day. Those are not hard and fast."⁵ Likewise, Dr. Stein said that with regard to alternating sitting and standing at reasonable intervals, there again should be flexibility but opined that "if [claimant] is standing for anywhere between thirty and sixty minutes he should have the opportunity at least to sit down somewhere during that time frame for a little while. Sitting probably should have the opportunity of, let's say, two hours to at least get up and stretch and move around a little bit."⁶ Based upon these permanent work restrictions Dr. Stein opined that claimant had lost the ability to perform 13 of the 25 job tasks identified in the list prepared by Monty Longacre, claimant's vocational expert.

Claimant testified on July 7, 2003, that following his previous testimony on July 18, 2001, his back pain worsened to the point he sought additional medical treatment on his own. A dorsal column stimulator was recommended for pain and eventually this was installed. After a trial period, a permanent dorsal column stimulator was installed on June 27, 2003. Although claimant did not say so, the temporary dorsal column stimulator must have improved his symptoms because claimant acknowledged a permanent dorsal column stimulator was installed based upon the results he obtained from the temporary trial unit. Nevertheless, claimant describes his overall condition as worse now than when he testified

¹ Decision at 3 (Sept. 11, 2003).

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ Stein Depo. at 9 (Aug. 5, 2003).

⁴ *Id.* at 9.

⁵ *Id.* at 9 and 10.

⁶ *Id.* at 10.

in June 2001. Claimant is also taking pain medication and antidepressants. Claimant has not looked for work anywhere since he last testified nor for that matter since he last worked for respondent on April 12, 2001. According to claimant, his pain is too great. However, no doctor has said claimant cannot work and claimant is not requesting a permanent total disability award at this time, although claimant has applied for social security disability. Claimant testified again on August 5, 2003. At that time he indicated that the dorsal column stimulator had improved his pain somewhat but that he was still having pain in his low back, and severe aching down both legs and into his feet.⁷

Judge Fuller determined claimant had a 55 percent work disability based upon the average of a 58 percent wage loss and a 52 percent task loss and modified the prior work disability award beginning November 1, 2002. As the record shows that respondent most likely would have returned claimant to an accommodated full time position earning at least 90 percent of his pre-injury average weekly wage, claimant's entitlement to a work disability ceased as of July 18, 2003, the date claimant was released from his restriction limiting the number of hours he could work per day.

The Board affirms Judge Fuller's determination that claimant's condition changed and that he is entitled to modification of his work disability award from 29 percent to 55 percent beginning November 1, 2002 and continuing until July 18, 2003, when Dr. Stein released claimant to full time work. However, the ALJ erred in computing the award because permanent partial disability compensation should have ceased on July 18, 2003. Therefore, the Board will recalculate the award in this Order to correct that error, but the ALJ's Decision is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the September 11, 2003 Decision entered by Administrative Law Judge Pamela J. Fuller should be and is hereby modified as follows:

From the date of accident of June 21, 2000 until July 18, 2003, claimant is entitled to 33 weeks of temporary total disability compensation at the rate of \$383 followed by 127.43 weeks of permanent partial general disability compensation at the rate of \$383 per week, for a total award of \$61,444.69 all of which is past due and owing and is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the ALJ's Decision that are not inconsistent with the above.

IT IS SO ORDERED.

⁷ Edwards Depo. at 7 (Aug. 5, 2003).

Dated this _____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
 Crystal Neisham, Attorney for Respondent and Universal Underwriters Group
 Pamela J. Fuller, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director